United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 30, 2010

TO : Rochelle Kentov, Regional Director

Region 12

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Professional Baseball Umpire 530-6067-0100-0000

Corporation (PBUC) 530-6067-4000-0000
Case 12-CA-26612 530-6067-4001-1750
530-8045-0100-0000
530-8045-3700-0000

This Section 8(5) case was submitted for advice as to whether the Employer was privileged to unilaterally implement and enforce a new background-check policy for umpires under the <u>Provena St. Joseph Medical Center</u> clearand-unmistakable-waiver standard.

We conclude that the Employer was privileged to implement and enforce the background-check policy without bargaining with the Union because the Union clearly and unmistakably waived its right to bargain over the policy and its effects.

FACTS

Professional Baseball Umpire Corporation (the Employer) provides umpires for different levels of minor league baseball. The Employer and the Minor League Association of Umpires (the Union) are parties to a collective-bargaining agreement, which is effective from June 1, 2006, until November 30, 2011.

The Employer requires umpires applying for an initial position to sign a release for a background check as part of the application process. After conditionally offering an applicant a position, the Employer conducts a background check on the applicant. The Union and Employer also have had an understanding with Major League Baseball that in order for one of the Employer's umpires to be considered for a temporary or fill-in assignment by Major League Baseball, the umpire must sign Fair Credit Reporting Act authorization and consent forms authorizing Major League Baseball to conduct a background check into his credit records. But before late 2009, the Employer did not conduct background checks for its umpires with one or more seasons of service.

Provena St. Joseph Medical Center, 350 NLRB 808 (2007).

On October 23, 2009, 2 just prior to implementing a new policy of doing end-of-season background checks for current employees, the Employer sent a memo to all umpires it intended to retain for the 2010 season stating that it would "look forward" to seeing them in the spring. 3 The memo was attached to the umpires' year-end evaluation, which contained each umpire's ranking. Umpires Carafo and Karis were among those who received the memo. 4

On November 24, the Employer told the Union that it had conducted a round of public-record checks on the umpire staff, that about 12 umpires had "issues," and that the Employer would be contacting those umpires to discuss their background checks and to get their input. Thereafter, on November 30, the Employer notified four umpires, including Carafo and Karis, that they were being released based on information disclosed in their background checks.

That same day, by letter, the Union asked the Employer to confirm that the "reason and process" for background checks remained as discussed and memorialized by the parties. The Union added that the Employer had apparently expanded the scope of its background-check policy beyond current candidates for Major League Baseball assignments.

During a phone conversation in December, the Union asked the Employer what had caused it to suddenly do background checks for current umpires. The Employer responded that it needed to know about people's histories since they would be driving and working on the field with batboys and batgirls.

On December 3, after having discovered that the information on two of the four umpires it had released was erroneous, the Employer reinstated those two umpires. But the Employer did not reinstate Carafo and Karis because the information about them was accurate.

² All dates hereafter are 2009 unless otherwise noted.

³ Although the Employer sends a similar memo every year at about the same time, it does not send out actual employment offers until early January of the following year. At that time, the Employer sends the umpires a Minor League Umpires Assignment and Acceptance form, which they must sign and return within 21 days.

⁴ The rankings showed Cafaro as 5th out of 40 umpires in Short Season Class A, with only the bottom three released, and Karis as 15th out of 36 in Advanced Class A, with only the bottom four released.

On December 17, the Union filed grievances pursuant to Article 8 of the collective-bargaining agreement, contending that the Employer lacked "just cause" for the discharges of Cafaro and Karis. On January 4, 2010, the Employer responded by letter asserting that it had the right under Article 7 of the collective-bargaining agreement (retention policy, described infra) to release umpires at the end of a season for any reason, and that the discharges were not grievable. A few days later, the Employer clarified that, since the umpires were being released under the contractual retention policy, and the "just cause" discharge provision applied only to discharges during a baseball season, the discharges were not grievable.

In a January 8, 2010 letter to the Employer, the Union reiterated its position that the discharges of Cafaro and Karis are grievable under the collective-bargaining agreement because the Employer discharged them for claimed cause following the background checks. The Union also argued that background checks on incumbent umpires are a mandatory subject of bargaining, and requested the Employer to meet and bargain with the Union before implementing any policy concerning background checks.

On January 15, 2010, the Union filed the instant charge alleging that the Employer implemented a policy of conducting background checks on current umpires without giving the Union notice and an opportunity to bargain, and that the Employer failed to bargain over the effects of the policy.

The Employer asserts that it was privileged under the contract to take the unilateral actions at issue, and that the Union clearly and unmistakably waived its right to bargain regarding the implementation and enforcement of the background-check policy. In particular, the Employer relies on the following language from Articles 4, 7, and 8 of the contract:

Article 4 - MANAGEMENT RIGHTS

The Employer reserves and retains the right to direct, manage and control the business and the work force. This includes, but is not limited to, the right:

To hire, discharge, suspend, discipline, transfer, promote or demote, except that discharge or suspension of more than five (5) days must be for just cause, provided, however,

⁵ The Union has not alleged that the Employer's refusal to process the grievances was a separate violation of the Act.

that nothing herein shall limit the Employer from exercising its right under the Retention Policy, as set forth in Article 7, not to employ an employee for a new season. It is expressly agreed that employment decisions made in accordance with the Retention Policy, as set forth in Article 7, shall not be subject to the grievance/arbitration provisions set forth in Article 8, except that the Employer shall not rely upon or invoke the Retention Policy as a subterfuge to avoid its just cause obligations under the Agreement; . . .

To make, revise and enforce rules, policies and procedures, including but not limited to, those relating to standards of conduct on and off the field, alcohol, drugs and gambling...

These rights are limited only to the extent that this Agreement specifically so provides and may be exercised without prior consultation with the Union. .

Article 7 - RETENTION POLICY

... The Employer reserves the right in its sole discretion to release any umpire after the end of any season at any time for any reason . . .

On behalf of all of the employees, the Union agrees that umpires released after the end of any season waive any and all rights to protest such release through resort to the courts or otherwise, or to receive any information from the Employer related to such release.

If an umpire is not released pursuant to this Retention Policy and is offered and accepts an assignment for a subsequent season, he shall not thereafter (from the date of his acceptance through the conclusion of such season) be discharged except for just cause. . .

Article 8 - GRIEVANCE AND ARBITRATION

A grievance is defined as a claim that the Employer has violated this Agreement, including a claim that a suspension in excess of five (5) days or an in season termination was without just cause. There is no right to file a grievance over decisions that are within management's rights as set forth in this Agreement.

Both parties agree that they did not discuss or negotiate whether the just-cause protection of Article 7 of the collective-bargaining agreement is triggered when an umpire is mailed his year-end evaluation and ranking. The

Employer asserts that the "just cause" protection of the contract is triggered only when an umpire has signed and returned the employment offer. Consistent with that interpretation, the Employer presented evidence that it had released an umpire in 2007 after he had received his yearend evaluation and ranking but before the Employer had sent out formal offer letters, when the Employer learned that he had a criminal record. The Union did not file a grievance over or otherwise contest this release.

ACTION

We conclude that the Employer was privileged to implement and enforce a background-check policy without bargaining with the Union because the Union had clearly and unmistakably waived its right to bargain over the policy and its effects.

An employer violates Section 8(a)(5) when it makes a unilateral change in unit employees' terms and conditions of employment unless authorized to do so by a union waiver of bargaining rights. In Provena, the Board reaffirmed its long-held position that a union may waive its right to bargain over mandatory subjects only if the waiver is "clear and unmistakable." This standard "requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." Waiver of statutory rights will not be "lightly inferred," and the employer bears the burden of establishing that waiver has occurred. 10

Although a waiver must be clear and unmistakable, it need not be explicit. As noted in Provena, the Board can find a waiver if a contract either "expressly or by necessary implication" confers on management a right to

⁶ Johnson-Bateman Co., 295 NLRB 180, 182-185 (1989) ("It is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable.")

^{7 350} NLRB at 811-813; see also Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).

⁸ Provena, 350 NLRB at 811.

⁹ New York Mirror, 151 NLRB 834, 839 (1965).

Beverly California Corp., 326 NLRB 153, 153 n.3 (1998).

unilaterally take the action in question. 11 When a contract does not specifically mention the action at issue, the Board will interpret the parties' agreement to determine whether there has been a clear and unmistakable waiver. In interpreting the parties' agreement, the relevant factors to consider include: (1) the wording of the proffered sections of the agreement(s) at issue; (2) the parties' past dealings; (3) the relevant bargaining history; and (4) any other provisions of the collective-bargaining agreement or other bilateral arrangements that may shed light on the parties' intent concerning bargaining over the change at issue.

Applying those factors here, we conclude that, although conducting criminal background checks for purposes of deciding whether to terminate employees is a mandatory subject of bargaining, 12 the Union clearly and unmistakably waived its right to bargain over the implementation and effects of the background-check policy.

With respect to the first factor, Article 4 ("Management Rights") grants the Employer the right to "make, revise and enforce rules, policies and procedures, including but not limited to, those relating to standards of conduct on and off the field, alcohol, drugs and gambling." This would arguably include implementing a background-check policy to detect improper off-the-field conduct. Article 4 also privileges the Employer to exercise those rights "without prior consultation with the Union," and states that those rights are limited "only to the extent that this Agreement specifically so provides." No other provision in the contract restricts the Employer's right to implement or enforce a background-check policy. Thus, the plain language of Article 4 indicates that the Union waived its right to bargain over both the implementation and effects of a background-check policy.

Similarly, Article 7 ("Retention Policy") grants the Employer the "sole discretion to release any umpire after the end of any season at any time for any reason," and states that the Union agrees that "umpires released after the end of any season waive any and all rights to protest such release." Here, the Employer conducted background

 $^{^{11}}$ Provena, 350 NLRB at 812, n.19, (citing New York Mirror, 151 NLRB at 839-40).

¹² See, e.g., Bath Iron Works, 302 NLRB 898, 902 (1991) (adding new grounds for discipline for drug or alcohol-related offenses is a mandatory subject of bargaining); United Cerebral Palsy of New York City, 347 NLRB 603, 607 (2006) (rules governing the imposition of discipline for employees are mandatory subjects of bargaining).

checks on the umpires after the end of the season and terminated two umpires based on information found in their background checks. Thus, since the discharges here took place after the end of the season, the clear language of Article 7 also supports a conclusion that the Union waived its right to bargain about both the background checks and their effects.

As to the second factor, the parties' past dealings are also consistent with a finding of waiver in this case. The evidence shows that the Employer had previously discharged at least one umpire at the end of a season after learning of his criminal record. As in the instant case, that discharge occurred after the umpire had received his evaluation but before he received an official offer letter. The Union did not file a grievance over or otherwise contest this release. Although the Employer did not discover the information through a background check, it was the same type of information that the Employer relied upon for the terminations in the instant case.

As to the third factor, there is some evidence about the parties' bargaining history that sheds light on the parties' intent concerning bargaining over background checks. During negotiations for the parties' 2001 contract, the Union proposed protecting umpires from release between seasons except on the basis of their seasonal evaluations and providing year-round "just clause" protection. The Employer rejected those proposals in favor of the current language. The Employer's rejection of those proposals and the parties' failure to incorporate that language into the contract further supports a finding that the Union waived its bargaining rights on this subject. Moreover, although the Union argues that umpires who receive end-of-season rankings should be considered to be employed for the following season, it concedes that there has been no agreement, or even discussions, indicating that distribution of the year-end evaluation and ranking triggers the just-cause protection of Article 7.

As to the fourth factor, Article 8 of the contract ("Grievance and Arbitration") further supports the Employer's position that it had the right to unilaterally implement the background-check policy and terminate the umpires based on the results of the background checks. Article 8 defines a grievance as including a claim that an in-season termination was without just cause, and states that there is "no right to file a grievance over decisions that are within management's rights as set forth in this Agreement." Therefore, Article 8 appears to limit the Union's right to file grievances to in-season discharges. Thus, given the timing of the discharges and the language of Articles 4 and 7, Article 8 further supports the

Employer's contention that it had the right to implement and enforce the background-check policy.

For these reasons, we conclude that the Union clearly and unmistakably waived its right to bargain over the implementation and enforcement of the background-check policy under these circumstances. Accordingly, absent withdrawal, the Region should dismiss the allegation.

B.J.K.